KALALUKA MUSOLE v THE PEOPLE (1963 - 1964) Z and NRLR 173 (CA)

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COURT OF APPEAL

[Before the Honourable the Chief Justice, SIR DIARMAID CONROY, the Honourable Mr. Justice BLAGDEN, and the Honourable Mr. Justice WHELAN on the 7th and 18th December, 1964.]

Flynote

Defences available to an accused under the Penal Code - mistake, intoxication and provocation as defences - sections 11, 14, 182 and 183 of the Penal Code.

**On the issue of intoxication see also Sikunyema v The Queen reported in this volume, p. 66.*

Headnote

The appellant was divorced from his wife in accordance with customary law. A few days later the deceased proposed marriage to her, and although she did not accept, she agreed to become his girl - friend. The appellant objected to this arrangement, accused the deceased of abducting his wife, and had a fight with the deceased at his house, in which two other men were involved. After this fight was stopped the appellant went away, but in the early hours of the morning he was heard shouting, and the deceased was found dead in his house. The appellant was convicted of the deceased's murder and now appealed.

Held:

That the defences of mistake, intoxication and provocation advanced on behalf of the accused could not succeed for the reasons set out in the judgments.

Appeal dismissed.

Cases cited:

(1) *Wallace Johnson v R* [1940] 1 All ER 241.

(2) *Broadhurst v Reginam* [1964] 1 All ER 111.

(3) *D P P v Beard* [1920] A.C. 479; [1920] All ER Rep. 21; 14 Cr. App. R 159.

(4) *R v Zakario Simulolo* (1964) SJNR 73.

(5) *Mancini v D P P* [1941] 3 All ER 272; 28 Cr. App. R 65.

(6) *Yohane v The Queen* 5 NRLR 716.

(7) *R v McCarthy* [1954] 2 All ER 262; 38 Cr. App. R 74.

(8) *Lee Chun - Chuen v Reginam* [1963] 1 All ER 73.

(9) *Leosoni alias Leonsion s/o Matheo v R* [1961] EA 364.

(10) *In re Woking Urban Council (Basingstoke Canal)* Act, 1911 [1914] 1 Ch. 300.

(11) *R v Justo Odima* (1941) 8 EACA 29.

A B Mitchell - Heggs, Assistant State Advocate for the people

S Patel for the appellant

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Judgment

Conroy CJ: The principal question in this appeal is as follows: if a person accused of murder was deprived of his self - control as a result of an act of the deceased which would not have so provoked the accused had he been sober at the time, can the killing be said to be on provocation so as to reduce it from murder to manslaughter, under the provisions of sections 182 and 183 of the Penal Code?

Although the point arises not infrequently in this country, there has been no considered judgment of this court on it. We think it might be helpful if we were now to deal with the law and the authorities.

It is for the prosecution to prove, beyond a reasonable doubt, all the ingredients of the offence charged. If the charge is murder, it is for the prosecution to prove malice aforethought. If one or more of the circumstances prescribed in section 180 of the Penal Code is or are proved, then malice aforethought shall be deemed to be established. In the instant case, the prosecution sought to prove the circumstance set out in section 180 (a) - that the accused intended either to cause the death of, or grievous harm to, the deceased.

Section 14 of the Penal Code contains the law of this country on the extent to which drunkenness constitutes a defence to any criminal charge. Subsection (1) provides -

> Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

It is clear from the language of this subsection that the section was intended to contain as far as possible a full and complete statement of the law of intoxication as it affects criminal liability in Zambia. It must, therefore, be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England. See *Wallace - Johnson v R* [1940] 1 All ER 240.

Subsections (2) and (3) provide that intoxication may be a defence in cases where the accused, by reason of intoxication, did not know what he was doing or did not know that what he was

doing was wrong. This issue did not arise on the evidence in the instant case, and therefore we are not concerned with these subsections.

Subsection (4) provides as follows:

> Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

The meaning to be attached to a precisely similarly worded subsection of the Criminal Code of Malta was considered by the Judicial Committee of the Privy Council in *Broadhurst v Reginam* [1964] 1 All ER 111. In that case the learned trial judge in Malta adopted the approach laid down by Lord Birkenhead in *D.P.P v Beard* [1920] A.C. 479; the board held this approach to be wrong, Lord Devlin (in *Broadhurst's case*) said this at page 122:

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> ". . . Under subsections (4) it would appear that drunkenness is to be taken into account for the purpose of determining whether the person charged had in fact formed any intention necessary to constitute the crime. The corresponding proposition laid down in *Director of Public Prosecutions v Beard* is that evidence of drunkenness which renders the accused *incapable* of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent. There is no mention in the code of incapacity. The proposition stated in *Director of Public Prosecutions v Beard* is not altogether easy to grasp. If an accused is rendered incapable of forming an intent, whatever the other facts in the case may be, he cannot have formed it; and it would not, therefore, be sensible to take the incapacity into consideration together with the other facts in order to determine whether he had the necessary intent. It may be that the wording of section 35 (4) of the code is designed to avoid this logical difficulty and that there is no substantial difference between the two propositions. Or it may be that the law as laid down in *Director of Public Prosecutions v Beard* must now be interpreted in the light of later decisions on the proof of guilty intent. But superficially at any rate section 35 (4) of the code and *Director of Public Prosecutions v Beard* approach differently the problem of proving intent. One way of approaching the problem is to say that it is always for the Crown to prove that the accused actually had the intent necessary to constitute the crime: and that that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances. Prima facie intoxication is one circumstance to be taken into account and on this view all that section 35 (4) is doing is to make it plain that intoxication is not to be excluded. On the other hand, the sort of approach that is contemplated in *Director of Public Prosecutions v Beard* is that there must be proof (or at least some suggestion) of incapacity in order to rebut the presumption that a man intends the natural consequences of his acts.

It is my considered view that the proper approach to this problem which section 14 (4) requires the court to follow is not the one laid down in Beard, but the later one adumbrated above by Lord Devlin. It is for the prosecution to prove all the ingredients of the offence; one of the ingredients of the offence is the intent of the appellant, and if the prosecution fail to prove beyond a reasonable doubt that he intended to kill or to do grievous harm, he cannot be convicted of murder. In deciding whether this ingredient has or has not been proved, the court has to consider the " totality of the circumstances ", and one most material circumstance in this regard is whether the appellant was intoxicated, and the extent of such intoxication.

The learned trial judge dealt with this matter in the following passage in his judgment:

". . . The question then arises: Am I satisfied beyond reasonable doubt that the accused struck the deceased with intent to

kill or inflict grievous harm upon him? In answering that question regard must be had to the effect of the accused having been in some degree of intoxication at the time, as I have assumed in his favour to have been the case.

In *Regina v Zakario Simulolo* (1964) S.J.N.R 73, I said that -

' Section 14 (4) (of the Penal Code) is an express recognition that intoxication may affect the exercise of capacity. It may do so in either of two ways, one in favour of an accused and the other against him. It may have retarded the exercise of a particular capacity, so that instead of several capacities being exercised simultaneously, only one, such as the will to strike the deceased a blow, may have become operative before another, as an appreciation of the consequences, became operative. In short, regard must be had to intoxication as impairing the co - ordination of the exercise of the different mental capacities or faculties, and impairing the judgment and producing what is colloquially called " slow - wittedness ". On the other hand, intoxication may suppress the capacity of fear, or put more simply, may inspire a person with courage to do an act while realising and intending its probable consequences from which he could shrink when sober.'

Here, I have no doubt, that if the accused's mind was affected in any way by intoxication it was certainly not in the exercise of capacity to appreciate and intend the consequences of his action in striking the deceased. The fact that he told his ex - wife that he wanted to kill a jackal and that, at what must have been immediately after killing the deceased, he went round shouting about his act leaves me with no doubt that when he struck the deceased he had the intention of killing him."

In cases such as this, I prefer to avoid the use of the word " capacity " or " incapacity ". It is not a question of whether the appellant was capable or incapable of forming the necessary intent, but of considering his intoxication as one of the circumstances on which to reach a decision as to whether he had in fact formed the intent to cause death or grievous harm. Beard's case proceeded

on the principle that drunkenness which renders the accused incapable of forming the necessary intent should be taken into account in deciding whether he had that intent. As Lord Devlin said, it is not a question of incapacity under the code.

On the facts of the present case, I consider that the learned trial judge could have reached, applying this test, no other conclusion than that which he did reach, namely that when the accused struck the deceased he had the intention of killing him.

This brings us to the principal question in issue. The appellant killed the deceased because he found him sleeping with Ma - Mubiana Lubinda, whom the appellant had divorced some days previously. Assuming, for the sake of argument, that the appellant believed (because he was intoxicated) that she was still his wife, can one say that the deceased's conduct was, by reason of that belief, a wrongful act or insult

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for the purpose of the definition of provocation in section 183 of the Penal Code? Omitting those parts of that definition irrelevant to the present issue, section 183 reads as follows:

"The term provocation means any wrongful act or insult of such a nature as to be likely when done or offered to an ordinary person to deprive him of his self - control and to induce him to assault the person by whom the act or insult is done or offered. The expression ' ordinary person ' means an ordinary person of the community to which the accused belongs."

I think the clue to the problem lies in the expression " ordinary person ". The first test to be applied is a hypothetical one - what effect would this particular wrongful act or insult have on an ordinary person? It is an objective test. It is, not how would this insult have affected an extraordinary person - e.g. an unbalanced person who would be more easily deprived of his lack of control - In this sense I think one can equate the word " ordinary " with the word " reasonable " or " average ". For example, in *Mancini v D.P.P.* [1941] 3 All EE 272 Lord Simon so equated " ordinary " and " reasonable " when he said:

"The test to be laid down is that of the effect of the provocation upon a reasonable man . . . so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did."

In *Yohane v The Queen* 5 NRLR 716 the Rhodesia and Nyasaland Court of Appeal considered the related, but not precisely similar, problem of a provoked man who, because of intoxication, uses excessive force in retaliating. Lewey, JA, in giving the judgment of the court clearly equated " ordinary " with " reasonable " when he said:

"The tests to be applied are quite clear. What has to be considered is, first, the effect of the deceased's conduct on a reasonable, ordinary man, such as the appellant . . ."

The problem was considered in *R v McCarthy* [1954] 2 All ER 262. Although the general English law of manslaughter is substantially different from that contained in section 182 and

section 183 of our Code, on this particular point they are so similar that the English authorities must carry great weight. In *McCarthy's case* the court said:

"We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self - induced intoxication. It may be that an excitable, pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely on his excitable state of mind if the violence used is beyond that which a reasonable, or, as we may perhaps say, an average person would use to repel an act which can in law be regarded as provocation."

To reduce murder to manslaughter, sections 182 and 183 require two conditions to be satisfied -

(a) that the provocation would cause in any ordinary, reasonable person a sudden and temporary loss of self - control; and

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(b) that it actually caused the accused in fact so to lose control of himself that he kills in the heat of passion.

The Judicial Committee made this division clear when they said, in *Lee Chun - Chuen v Reginam* [1963] 1 All ER 73 at 79:

"Provocation in law consists mainly of three elements - the act of provocation, the loss of self - control both actual and reasonable, and the retaliation proportionate to the provocation."

Therefore, for the offence to be reduced to manslaughter, the wrongful act or insult must be such as to fall within the definition of " provocation " as set out in section 183. One of the ingredients of that definition is that the wrongful act or insult should have been such as to deprive an ordinary reasonable man of his self - control. Clearly the legislature, in using the word " ordinary " did not intend to include an intoxicated man within the ambit of that definition.

In the instant case there is indication that the appellant actually ceased to be in control of himself because of the facts which his intoxicated mind may well have assumed were true. But that is only the second half of the test. The first half has not been complied with, because an ordinary man, i.e. a reasonable, average, ordinary man, would not, in like circumstances, have been deprived of his power of self - control.

The point was argued before the learned trial judge, and also before us, in a somewhat different manner. Reliance was placed on section 11 of the Penal Code, which provides as follows:

"A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

It was put to us that the appellant, being intoxicated, had genuinely believed Ma - Mubiana Lubinda still to be his wife. This was, it was suggested, an " honest and reasonable, but mistaken belief ".

I have been unable to find any local authorities on this point. In *Leosoni alias Leonsion s/o Matheo v R* [1961] E.A. 364 the East Africa Court of Appeal considered a similar problem, but their decision was not directly in point and was specifically expressed to be obiter. The provisions of the Tanganyika Penal Code, which they were there considering, were in all material respects, the same as sections 11 and 182 of our code. They decided that the words -

"The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject,"

did not apply to exclude the principle of mistake by reason of the express statutory definition of " provocation " in section 202 of the Tanganyika Code, and in section 183 of our code. They considered, however, that section 11 only applied to mistakes of fact and not to mistakes of law. It is to be noted that the marginal note to the section is " Mistake of fact." In the instant case it was a question of law whether the appellant's

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marriage had terminated, but I would not wish to make my decision on this narrow ground. While not accepting that marginal notes are written by " irresponsible persons " (see *In re Woking Urban Council (Basingstoke Canal)* Act, 1911 [1914] 1 Ch. 300 at 322) I consider that the wording of section 11 must prevail, and when the section speaks of a " belief in the existence of any state of things " that expression is wide enough to include a question of status which may depend upon either fact or law or both. Here it is suggested that the appellant believed he was still married, which must fall within the expression " any state of things ". I therefore consider that the East Africa Court of Appeal decision does not assist.

I think the appellant's argument again fails upon the word " reasonable ". To avail the appellant his mistaken belief had to be both reasonable and honest. I cannot accept that a belief induced by intoxication is reasonable. The learned trial judge adopted the precisely correct approach to this issue, when he set out the answer to the problem in the following words:

"The . . . answer is that the submission is really based on section 11 of the Penal Code, whereby the doing of an act under an honest and reasonable, but mistaken belief in the existence of a state of act [*sic*] attaches no greater criminal responsibility to the act than would attach if the real state of things had been in accordance with the belief. The belief, however, must be reasonable, and a mistaken belief engendered by drunkenness cannot be reasonable."

It was for the foregoing reasons that I considered this appeal should be dismissed.

Judgment

Blagden JA: By his initial grounds of appeal the appellant stated that he had fought the deceased because he was with his wife and that he had had no intention of killing him. Mr. Patel for the appellant was granted leave to argue additional grounds. These were, shortly, first, that the appellant was intoxicated to such an extent as to be incapable of forming the necessary intent to commit murder; secondly that, the appellant entertained the mistaken but honest belief that Ma - Mubiana was still his wife, albeit that that belief may have resulted from his intoxicated state; thirdly, that the conviction was against the weight of evidence in that, in particular, the judge did not give due consideration to the fact that most of the prosecution witnesses were related to the deceased and on that account their evidence was likely to be prejudicial to the appellant.

I find no substance in that third ground and I do not think the other two afford the appellant any assistance in the circumstances here. But I think they deserve some consideration.

The first point to remember is that the Penal Code, which may be regarded as having been framed with the intention of its constituting a complete code of the penal matters it deals with, includes express provisions relating to such matters as intoxication, provocation and mistake. It follows on the authority of *Wallace - Johnson v R* [1940] 1 All ER 241, that it is to those provisions which the court must look, and that they must be construed in their application to the facts of this

case - to quote the words of Viscount Caldecote, L.C., in that case at page 244 letter D - " free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland ".

As I understand it, the case which the appellant was putting forward on these two grounds is a combination of provocation, intoxication and mistake. In homicide cases these three elements are often closely interrelated. All are legislated for by various sections of the Penal Code, and by those sections and others, the legislature has provided that certain circumstances constitute defences to criminal charges. The sections themselves prescribe the conditions subject to which those defences are maintainable. They formulate, in effect, tests which have to be applied and which have to be satisfied before those defences can prevail.

But in saying this I would stress that with the exception of the defence of insanity, with which we are not concerned in this appeal, there is no *onus* on an accused person to prove or establish any of these defences. The *onus* remains on the prosecution throughout to prove the accused's guilt as charged beyond reasonable doubt; and it is for the prosecution to negative these defences when they arise.

But naturally there is no *onus* on the prosecution to negative something that is not there. The defence must be raised. Lord Devlin's words in *Lee Chun - Chuen v R* [1963] 1 All ER 73 at 77 letter I are appropriate here. He was dealing specifically with the defence of provocation, but

his *dicta* apply equally to the other defences introduced by these sections in the Penal Code. He said: " It is not of course for the defence to make out a *prima facie* of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need do is to point to material which could induce a reasonable doubt ". And then again at page 79 letter D: " the defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements " (of provocation); and finally at page 80 between letters C and D: " What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable, or from the evidence of other witnesses, or from a reasonable combination of both, a credible narrative of events disclosing material that suggested provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one."

Ordinarily, these special defences are specifically raised by or on behalf of the accused. But a defence may arise by itself as a result of the evidence adduced before the court. In either event it becomes an issue which the court must decide and the burden of proof in regard to it is upon the prosecution to satisfy the court beyond reasonable doubt that the defence so raised cannot be maintained.

I should like now to examine in some detail the tests imposed in respect of each of the defences raised here on behalf of the appellant by the relevant sections in the Penal Code. Provocation is dealt with in sections 182 and 183; intoxication in section 14; and mistake in section 11. It seems to me convenient, and indeed logical that where a defence of intoxication is raised, it should be dealt with first.

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BLAGDEN JA

The parts of section 14 which define and explain the defence of intoxication are subsections (1), (2) and (4). They read as follows:

"(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

It is to be observed that this section provides basically that intoxication is no defence to a criminal charge except in two prescribed events. The first of these events is where the effect of intoxication is such that the accused did not know what he was doing, or did not know that what he was doing was wrong. This event is subject to the *proviso* that either the accused's state of intoxication was not self - induced, or that the effect of it was so great as to render the accused insane, temporarily or otherwise. The second of these events is where the effect of the intoxication, with or without other factors, is such as to negative any intention in the accused specific or otherwise in the absence of which he would not be guilty of the offence with which he was charged.

I understand the case here was not that the appellant was so intoxicated as to be insane, but that his state of intoxication was such that he did not form the intention to commit murder. The learned trial judge dealt with this aspect of the case in the course of his judgment. He said: " Here, I have no doubt, that if the accused's mind was affected in any way by intoxication it was certainly not in exercise of capacity to appreciate and intend the consequences of his action in striking the accused." (I interrupt the quotation to observe that " accused " is obviously a slip for " deceased ".) The judge continued: " The fact that he told his ex - wife that he wanted to kill a jackal and that, at what must have been immediately after killing the deceased, he went round shouting about his act, leaves me with no doubt that when he struck the deceased he had the intention of killing him ". I do not think the judge's finding and reasoning here can be impeached.

That virtually disposes of intoxication. I think logically the next aspect to consider is that of provocation. This was indeed the appellant's main defence. Provocation is defined, and the circumstances under which

it will operate as a defence to reduce a homicide from murder to manslaughter is explained, in sections 182 and 183, of the Penal Code. These sections so far as relevant to the instant appeal are worded as follows:

"*Section* 182

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

Section 183

The term ' provocation ' means and includes except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person . . . to deprive him of the power of self - control and to induce him to assault the person by whom the act or

insult is done or offered. For the purpose of this section the expression ' an ordinary person ' shall mean an ordinary person of the community to which the accused belongs.

When such an act or insult is done or offered by one person to another . . . the former is said to give the latter provocation for an assault.

A lawful act is not provocation to any person for an assault . . ."

Taken together these two sections introduce primarily a dual test. First, there is the purely objective test introduced by section 183 to determine whether the act itself constitutes provocation or not; then there is the test introduced by section 182 (1) which is mainly subjective and determines whether the subject, that is the accused, was in fact provoked. There is, of course, the further test introduced by section 182 (2) which requires that the accused's act of retaliation which results in the deceased's death shall be reasonably proportionate to the provocation. But that was not an issue in this case here so I shall say nothing more about it.

Logically the objective test of section 183 must be applied first; and if the evidence of provocation adduced does not conform to the standards of this first test there is no point in going any further. But if this first test is passed, then it is necessary to apply the section 182 (1) test. This, as I have already stated, is mainly subjective - was the accused in fact provoked ? But there is also an objective element in it; for provocation to have the effect of reducing murder to manslaughter it must be " sudden "; and the issue of its suddenness is an objective one.

In the instant appeal the learned trial judge pointed out that a relationship between the appellant's ex - wife Ma - Mubiana and the deceased could not amount to a wrongful act done to the appellant nor could it constitute an insult to him of such a nature as would deprive

an ordinary person of the appellant's community of his self - control, for the customary law to which the appellant was subject recognised divorce and it was to be presumed that an ordinary person subject to that law would recognise that he had no right to control his ex - wife's relationship with members of the other sex. In short, the judge found that the appellant's case of provocation here failed to pass the first test. I would entirely agree. But the judge did go further: he applied the further objective test of the suddenness and proximity in time of the alleged provocation to the retaliation and found that the events of which the appellant complained were not sudden, and that there was an interval of time between the appellant's discovery of his ex - wife and the deceased together in the latter's house and his subsequent return there of sufficient duration to have allowed the appellant's passion to cool. He said: " . . . I have no doubt that the killing was not done on the sudden formation of an intent to kill, but pursuant to a premeditated intent ".

This finding, which, upon the evidence, cannot in my view be challenged, disposes of provocation.

There remains the issue of mistake. The submission here was that for some reason or other the appellant genuinely believed that he was still married to his ex - wife, and in the strength of that belief he reacted' as any other husband would have done upon discovering his wife committing adultery, by assaulting her paramour.

Section 11 of the Penal Code deals with the defence of mistake. The marginal heading to this section reads " Mistake of fact " but the type of mistake which by virtue of the provisions of section 11 constitutes a defence, is described in the text of the section as a " mistaken . . . belief in the existence of any state of things ", and it is this definition or explanation to which the court must look when adjudicating upon a defence of mistake. Omitting words which are not relevant to the instant appeal, section 11 provides that -

"A person who does . . . an act under an honest and reasonable, but mistaken, belief in the existence of any state of things, is not criminally responsible for the act . . . to any greater extent than if the real state of things had been such as he believed to exist . . ."

It will be apparent that here again there are two tests to apply: the objective test of whether the mistaken belief was a reasonable one; and the subjective test of whether the accused honestly held that mistaken belief.

The learned trial judge dealt with the issue of mistake in these terms ". . . the submission is really based on section 11 of the Penal Code, whereby the doing of an act under an honest and reasonable, but mistaken belief in the existence of a state of act [*sic*] attaches no greater criminal responsibility to the act than would attach if the real state of things had been in accordance with the belief. The belief, however, must be reasonable, and a mistaken belief engendered by drunkenness cannot be reasonable ". I agree, but I would add this qualification that it would still be possible for a drunken man to entertain a reasonable mistaken belief; and if the mistaken belief was reasonable, then in deciding whether it was honestly held, the accused's state of intoxication would be a most relevant

consideration. In the present case the appellant's alleged mistaken belief that he was married to Ma - Mubiana was obviously not reasonable having regard to the fact that it was he who had initiated the divorce proceedings and that he had attended the court with his wife and obtained a divorce from her there, only a few days before.

In conclusion I would like to make a general observation on the question of intoxication. Section 14 of the Penal Code with which I have already dealt is concerned primarily with the defence of intoxication by itself. From time to time it has been urged that the effect of intoxication should be taken into account in relation to or in combination with other defences. It was so urged in this case and I have already referred to its influence on the defence of mistake. It is usually associated with the defence of provocation. In England it is well established that a state of intoxication cannot be relied on in support of a defence of provocation on the basis that because of being intoxicated the accused was more likely to be provoked, or to be moved to violence if provoked.

See *R v McCarthy* [1954] 2 All ER 262. Surprisingly enough there is rather a dearth of African authority on this point although the learned Editor of Vol. 5 of the Northern Rhodesia Law Reports notes under the headnote to *Yohane v The Queen* 5 NRLR 716 that " The question of the relationship of drunkenness to provocation in murder cases is frequently arising in this territory ". That case dealt with the relevance of intoxication where the issue was whether the retaliation bore a reasonable relationship to the provocation and is of no direct assistance here. The only really direct authority which I have been able to find is the East African Court of Appeal case of *R v Justo Odima* (1941) 8 EACA. 29. This was a Kenya case. Section 14 of the Kenya Penal Code was the section dealing with intoxication and sections 203 and 204 dealt with provocation. The provisions of these sections so far as they are relevant to the instant appeal are virtually identical with the corresponding sections in our Penal Code here.

Sir Joseph Sheridan, CJ, delivering the judgment of the court in *Justo Odima*'s case said at page 30:

". . . we have been asked to hold that the appellant should be partially excused on the ground of provocation, and that in arriving at a decision as to whether he was suffering from provocation we should take into account his drunken condition rather than be guided by the test that the provocation should be such as would influence an ordinary person of the appellant's class . . . And as to whether his drunken condition and consequent susceptibility to offence should be a criterion on this issue of provocation, no authority in support of the proposition, a proposition which would lead to dreadful results, was cited to us."

In my view the short answer to the raising of the defence of into intoxication is, that when it is raised to show either that the accused did not know what he was doing or that he did not know that what he was doing was wrong, or that he had not formed any guilty intention, then its assessment is governed exclusively by the provisions of section 14 of the Penal Code. But where it is raised as affecting one or other of the special defences legislated for in the Penal Code such as provocation, mistake,

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WHELAN J

accident, or compulsion, then it cannot be taken into consideration with regard to any objective tests or criteria that have to be applied, but it may, and indeed must, be considered where the tests or the criteria to be applied are subjective.

In my view the appellant was convicted in this case on the clearest evidence and his defences that he was intoxicated and provoked and laboured under a mistaken belief that his former wife was still married to him were rightly held by the learned trial judge to have failed.

It was for these reasons that I concurred in dismissing this appeal.

Judgment

Whelan J: I agree with both judgments in this appeal and agree that the appeal should be dismissed.